APPENDIX A – DECISION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JANUARY 4, 1995

Richard SABO, Plaintiff,

v.

METROPOLITAN LIFE INSURANCE COMPANY, Gary Antonino, Joel Sherman, Ronald Shram and The United Food and Commercial Workers International Union, AFL-CIO, CLC, Defendants.

No. Civ. A. 94-307.

United States District Court, W.D. Pennsylvania

January 4, 1995

Daniel W. Ernsberger, Behrend & Ernsberger, Pittsburgh, PA.

Frederick N. Egler, Jr., Egler, Garrett & Egler, Pittsburgh, PA.

Richard M. Smith, Kim M. Watterson, Katarincic & Salmon, Pittsburgh, PA.

James R. Farley, Clare M. Wuest, Rothman, Gordon, Foreman & Groudine, P.C., Pittsburgh, PA.

Jay H. Spiegel, Saldamarco & Assoc., P.C., Pittsburgh, PA.

MEMORANDUM ORDER

LANCASTER, District Judge.

On March 17, 1994, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(l)(A) and (B), and Rules 3 and 4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on November 10, 1994, recommended that the motions to dismiss Counts I, II and III of the complaint filed by defendants Sherman (Docket # 3), Metropolitan Life Insurance Company (Docket # 9), Shram (Docket # 20), and Antonino (Docket # 22) be granted, that plaintiff's motion to amend the complaint (Docket # 29) be denied, and that plaintiff's motion for leave to take the deposition of Gary Antonino in support of plaintiff's reply to the motion to dismiss (Docket # 39) be denied. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all counsel by first-class mail on November 10, 1994. Objections were filed by plaintiff on November 21, 1994 (Docket # 44). On November 30, 1994, defendant Joel Sherman's opposition to plaintiff s objections was filed (Docket # 45), on December 5, 1994, defendant Metropolitan Life Insurance Company filed a brief in opposition to plaintiff's objections (Docket # 46), on December 5, 1994, defendant Gary Antonino filed a response to plaintiff's objections (Docket # 47), and on December 21, 1994, dcfendant Ronald Shram's opposition to plaintiff's objections was filed (Docket # 48). After de novo review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 4th day of July, 1995;

IT IS HEREBY ORDERED that the motions to dismiss Counts I, II and III of the complaint filed by defendants Sherman (Docket # 3), Metropolitan Life Insurance Company (Docket # 9), Shram (Docket # 20), and Antonino (Docket # 22) are granted, that plaintiff's motion to amend the complaint (Docket # 29) is denied, and that plaintiff's motion for leave to take the deposition of Gary Antonino in support of plaintiff's reply to the motion to dismiss (Docket # 39) is denied.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated November 10, 1994 (Docket # 43), is adopted as the opinion of the court.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

BENSON, United States Magistrate Judge.

I. RECOMMENDATION

It is respectfully recommended that the motions to dismiss Counts I, II and III of the complaint filed by defendants Sherman (Docket # 3), Metropolitan Life Insurance Company (Docket # 9), Shram (Docket # 20), and Antonino (Docket # 22) be granted, that plaintiff's motion to amend the complaint (Docket # 29) be denied, and that plaintiff's motion for leave to take the deposition of Gary Antonino in support of plaintiff's reply to the motion to dismiss (Docket # 39) be denied.

II. REPORT

This is an action filed by a former employee of defendant Metropolitan Life Insurance Company (Met Life). Plaintiff alleges that he was retaliated against by Met Life, through its employees Antonino, Sherman and Shram, for opposing schemes to defraud Met Life policyholders which "churning" schemes were perpetrated by Met Life through the individual defendants. The complaint is in seven counts. The first three counts allege violations of the Racketeer Influenced

and Corrupt Organizations Act (RICO) on the part of all defendants save the United Food and Commercial Workers International Union, AFL-CIO, CLC (the Union). The fourth count alleges a violation of the National Labor Relations Act (NLRA) against Met Life and the Union arising from the denial of a grievance filed by plaintiff. The fifth count alleges defamation on the part of Met Life through its agents. This is said to have occurred on August 24, 1993, when Met Life presented a videotape to its employees regarding the churning allegations made by plaintiff, and in which plaintiff alleges he was compared to the character "Slimer" in the movie "Ghostbusters." The sixth count alleges that Met Life agents called plaintiff's customers in the last half of 1993 and informed them that plaintiff was a "thieving son of a bitch." The final count contains allegations against Met Life of intentional interference with contractual relations in that Met Life is said to have stopped two potential customers from purchasing insurance from plaintiff.

Defendant Joel Sherman has filed a motion to dismiss asserting that plaintiff's RICO claims are precluded under the McCarran-Ferguson Act, and that the RICO claims should be dismissed for failure to state a claim. Defendant Met Life has filed a motion to dismiss the RICO claims asserting that plaintiff has failed to state a claim under any of the three sections relied upon in the complaint. Defendant Ronald Shram has filed a motion to dismiss plaintiff s RICO claims on grounds similar to defendant Sherman's motion. Defendant Antonino has filed a motion to dismiss plaintiff's RICO claims advancing arguments similar to those made by defendant Sherman.

Plaintiff has responded to the motions to dismiss, and they are ripe for disposition. Plaintiff has filed a motion for leave to amend the complaint in certain particulars set forth in his RICO case statement with respect to counts I-III. Defen-

dants oppose the amendment asserting that it would be futile. Plaintiff also seeks permission to conduct discovery in order to more fully respond to the motions to dismiss. Defendants oppose this motion also.

PRECLUSION UNDER McCARRAN-FERGUSON

The first issue to be addressed in this case is whether plaintiff may maintain his RICO claims in light of the McCarran-Ferguson Act, and specifically 15 U.S.C. § 1012 which provides as follows:

> § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948
>
> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of several States which relate to the regulation or taxation of such business.
>
> (B) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; Provided, That after June 30, 1948 . . . the Sherman Act, and . . . the Clayton Act and . . . the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Thus, as of the effective date of the Act, "[i]f Congress intended to invoke its Commerce Clause powers to occupy part

of the field of insurance regulation, it would expressly say so." *Cochran v. Paco, Inc.*, 606 F.2d 460, 463 (5th Cir. 1979) (addressing McCarran's preclusion of actions under the Truth in Lending Act).

There is a four-part test for preclusion of a federal action pursuant to the McCarran-Ferguson Act, and a finding of preclusion is warranted if:

> (1) the federal statute under which the allegedly precluded action is brought (here, RICO) does not specifically relate to the 'business of insurance'; (2) the complained-of activities constitute the 'business of insurance'; (3) the relevant state has enacted laws for the purpose of regulating these complained-of activities; and (4) the application of the federal statute would 'invalidate, impair or supersede' such state laws.

Wexco, Inc. v. IMC, Inc., 820 F. Supp. 194, 198 (M.D. Pa. 1993) (citing *LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 826 (N.D. Cal. 1992), and *Cochran v. Paco, Inc.*, 606 F.2d 460, 464 (5th Cir.1979)).

First, it is clear that RICO does not specifically relate to the business of insurance. Hence, the first part of the test for preclusion is met.

Plaintiff vigorously contests, however, that the actions complained of in this case constitute the "business of insurance." The complaint contains allegations of a "churning" scheme devised by defendant Antonino by which Met Life customers who had cash surrender values in their existing policies were induced by inaccurate information to purchase new insurance by using the cash surrender value of the old policy to fund the new policy. It is alleged that Met Life was able to turn large profits in this fashion, while imparting no

benefit to its clients.[1] Plaintiff alleges that he refused to take part in the practice, and referred one of his customers who had been "churned" to the Pennsylvania Insurance Commission. It is alleged that, as a result of his actions in opposition to the practice begun by Antonino, he was denied commissions, had some of his clients taken from him, was intimidated, transferred and then terminated by Met Life. Plaintiff also alleges that Met Life engaged in a "50/50" scheme whereby life insurance was sold to groups disguised as retirement accounts. Finally, plaintiff alleges that Met Life encouraged agents to participate in these two schemes, and punished those who would not.

Plaintiff is correct when he notes that not all activities of an insurance company involve the "business of insurance."

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement--these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was--it was on the relationship between the insurance company and the policyholder.

Securities & Exchange Commission v. National Securities, Inc., 393 U.S. 453, 460, 89 S. Ct. 564, 21 L. Ed.2d 668 (1969). The Supreme Court has offered more particular assistance in settling this question:

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[1] In fact, the Pennsylvania Insurance Commission investigated the practice and eventually imposed a substantial fine on Met Life.

> [T]hree criteria relevant in determining whether a particular practice is part of the 'business of insurance' [are] . . . first, whether the practice has the effect of transferring or spreading the policy-holder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself . . . .

Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 129, 102 S. Ct. 3002, 73 L. Ed.2d 647 (1982).

As can be seen, the underlying racketeering activity in this case involves the promotion and sale of insurance policies to Met Life customers, practices one would necessarily have to identify as part of the business of selling insurance. Plaintiff, however, is alleging fraud on the part of defendants. He asserts that fraud is not the business of insurance. *See, e.g., Thacker v. New York Life Ins. Co.*, 796 F. Supp. 1338 (E.D. Cal.1992) (The defendants induced the insured to purchase insurance through misrepresentations concerning the price of the policy. Further there was continuing fraud in using dividends from the policy to pay the difference between the true cost and the purported cost. The court held that, although these are activities which are usually encompassed within the business of insurance, the actions should be characterized as mail fraud, which is not the business of insurance). This approach, however, has been criticized as an exception that would swallow the rule:

> When a plaintiff invokes an action under a federal law against insurance entities, it is presumably because the plaintiff believes that the entities have acted improperly, in violating

> that law. Limiting the court's McCarran-Ferguson examination of those entities' activities to their wrongful character is inconsistent with the existence of Supreme Court precedent directing courts on the proper explanation to make in such circumstances. [Footnote omitted]. Given that wrongful conduct is always alleged, an approach that concludes that wrongful conduct is never the 'business of insurance' would leave no occasion for the courts to apply the principles that the Supreme Court has provided. To say that 'fraud is never the business of insurance' is to start down that road.

Wexco, supra at 201. Indeed, the entire purpose of the McCarran-Ferguson Act is to provide the states with the opportunity to regulate insurance within their borders. Part of that regulation in Pennsylvania relates specifically to the prevention of the very type of fraud alleged in this case. 40 Pa.C.S. §§ 1171.4, 1171.5(a)(l)(i) (deceptive trade practices), 1171.5(a)(2) (making or publishing false statements with respect to business of insurance), 1171.5(a)(8) (permitting or offering an insurance contract that is other than as expressed in the contract itself), and 1171.5(a)(12) (making false or fraudulent statements about or relative to an application for an insurance policy). The existence of the test set forth by the Supreme Court and the purpose of the Act itself counsel against any such sweeping exception for fraudulent conduct. *Accord, Senich v. Transamerica Premier Ins. Co.*, 766 F. Supp. 339, 341 (W.D. Pa. 1990) (mail fraud act does not refer to business of insurance and, like RICO, is not exempt from the McCarran-Ferguson Act). Hence, the underlying RICO activities alleged here, the schemes to defraud policyholders, arose during the practice of the "business of insurance" as that term has been defined by the Supreme Court.

With respect to the third factor, I do not understand plaintiff to challenge the fact that the Commonwealth of Pennsylvania has enacted "a comprehensive system of state insurance regulation" intended to occupy the field of regulating the business of insurance. *Wexco, supra* at 202; *Senich, supra* at 340-41. This factor also weighs in favor of preclusion.

Finally, with respect to the invalidation, supersession or impairment of state regulatory laws, the Commonwealth of Pennsylvania has enacted the Pennsylvania Unfair Insurance Practices Act (PUIPA), 40 Pa.C.S. § 1171, *et seq.* (1992). As noted earlier, the PUIPA provides a mechanism for regulating the exact type of conduct alleged in this case. Furthermore, Pennsylvania has determined that there is no private cause of action for such practices, and has vested enforcement powers in the Commonwealth's Insurance Commissioner. The availability of a federal private action based upon the alleged activities in this case would nullify the state's chosen regulatory remedies for insurance entity misconduct. *Wexco, supra; Senich, supra.*

All four of the factors set forth by the Supreme Court as a test for preclusion under the McCarran-Ferguson Act are met in this case. Plaintiff's RICO claims are, therefore, barred.[2]

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[2] Plaintiff notes that he is not suing as the insured in this case, and that his allegations should therefore survive. The RICO claims, however, are based solely on the existence of a RICO enterprise engaged in fraud against insurance customers. Plaintiff's claims are reliant upon the schemes to defraud, and are as much a part of the "business of insurance" as claims made by an insured.

PLAINTIFF'S MOTION TO AMEND THE COMPLAINT

Plaintiff seeks leave to amend the complaint, and specifically the RICO counts contained therein, to add various allegations concerning knowledge and acquiescence on the part of Met Life to the actions allegedly taken by defendant Antonino and others. In considering a motion to amend a complaint, the court should consider whether the amendment would be futile. *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 519 (3d Cir.1988). Put another way, if the proposed amendment would not survive a motion to dismiss, the court may deny leave to amend. *Massarsky v. General Motors Corp.*, 706 F.2d 111, 125 (3d Cir.), *cert. denied*, 464 U.S. 937, 104 S. Ct. 348, 78 L. Ed.2d 314 (1983). Plaintiff's new allegations would have no bearing on the McCarran-Ferguson analysis. Hence, the amendment would not cause plaintiff's RICO claims to survive a motion to dismiss, and the motion to amend should be denied.

PLAINTIFF'S MOTION FOR LEAVE TO DEPOSE DEFENDANT ANTONINO

Plaintiff has also filed a motion to depose defendant Antonino in order to develop a factual record for the court with respect to the motions to dismiss his RICO claims for failure to state a claim. This court has found it unnecessary to reach the 12(b)(6) motion, having concluded that it lacks subject matter jurisdiction. Hence, plaintiff's motion should be denied as moot.[3]

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[3] It should also be noted that a ruling on a motion to dismiss for failure to state a claim cannot rely on matters outside of the pleadings. Reliance on such matters would cause the motion to be converted into a motion for summary judgment. Rule 12. Hence, even if a deposition were taken, it would not be relevant to the

(continued...)

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that the motions to dismiss Counts I, II and III of the complaint filed by defendants Sherman (Docket # 3), Metropolitan Life Insurance Company (Docket # 9), Shram (Docket # 20), and Antonino (Docket # 22) be granted, that plaintiff's motion to amend the complaint (Docket # 29) be denied, and that plaintiff's motion for leave to take the deposition of Gary Antonino in support of plaintiff s reply to the motion to dismiss (Docket # 39) be denied.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(l)(B) and (C), and Rule 4 of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report.

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[3] (...continued)
motions before the court.

APPENDIX B – JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 23, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

96-3663

RICHARD SABO,

Appellant

v.

METROPOLITAN LIFE INSURANCE COMPANY, GARY ANTONINO, JOEL SHERMAN, RONALD SCHRAM, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC.

Appeal from the United States District Court for the
Western District of Pennsylvania
D.C. No.: 94-cv-00307
District Judge: The Honorable Donetta W. Ambrose

Before: STAPLETON, ALITO and SEITZ, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on October 16, 1997.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court dismissing plaintiff's RICO claim is reversed, the order denying plaintiff's motion to amend the complaint is vacated. The order of the District Court granting MetLife's motion for summary judgment on the plaintiff's defamation claim is reversed to the extent it was based on the ground relied on by the District Court. The opinion of the Court is without prejudice to a consideration by the District Court of other asserted grounds, if any, for summary judgment. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Dated: Feb. 23, 1998

APPENDIX C – DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 23, 1998

Filed February 23, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3663

RICHARD SABO

Appellant

v.

METROPOLITAN LIFE INSURANCE COMPANY, GARY ANTONINO, JOEL SHERMAN, RONALD SCHRAM; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 94-cv-00307)

Argued October 16, 1997

Before: STAPLETON, ALITO and SEITZ. *Circuit Judges.*

(Opinion Filed: February 23, 1998)

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OPINION OF THE COURT

Seitz. *Circuit Judge.*

This appeal primarily presents an issue that divides sister Courts of Appeals and is of first impression in our court – namely, whether the McCarran Ferguson Act, 15 U.S.C. §§ 1011-1015 (1994) ("The Act"), precludes a cause of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1994), where the challenged predicate acts arise out of the defendant's insurance business. The district court exercised jurisdiction over plaintiff's federal claims pursuant to 28 U.S.C. § 1331 and over supplemental state tort claims under 28 U.S.C. § 1367. Our appellate jurisdiction arises under 28 U.S.C. § 1291 to review the district court's final orders.

I. Factual Background

The Metropolitan Life Insurance Company ("MetLife") terminated the employment of Richard Sabo as an insurance sales agent in alleged retaliation for his refusal to participate in illegal trading activity. Mr. Sabo ("Plaintiff") then sued MetLife and several MetLife employees ("Antonino", "Sherman", and "Schram") in the district court, alleging causes of action under RICO as well as a claim based on the common law tort of defamation. In particular, the complaint recited the existence of three predicate acts under RICO: (1) a "churning" scheme, whereby MetLife encouraged and coerced agents to fraudulently trade insurance policies in order to accumulate commissions and decrease the value of outstanding policies; (2) a "50/50" insurance plan that MetLife fraudulently advertised as a retirement savings plan; and (3) an organized policy of intimidation and harassment by MetLife management directed toward its insurance agents to participate in these fraudulent activities.

The district court first granted a motion by all defendants to dismiss the RICO claims on the ground that the McCarran-Ferguson Act precluded such claims where the

causes of action arose from MetLife's insurance business. At the close of discovery, the district court, under a summary judgment standard, dismissed the remaining defamation action on the ground that the alleged defamatory statements were not sufficiently directed toward the plaintiff so that a jury could reasonably conclude that they referred to him. Plaintiff now appeals these two orders.

II. The McCarran-Ferguson Act

Because the central issue in plaintiff's RICO claims implicates an application of the McCarran-Ferguson Act, we turn first to that Act. Our standard of reviewing the district court's grant of a motion to dismiss is plenary. *Chester County Intermediate Unit v. Pennsylvania Blue Shield.* 896 F.2d 808. 810-811 (3d Cir. 1990).

Section 2 of the Act, codified at 15 U.S.C. § 1012, reads as follows:

> **Regulation by State law: Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948**
>
> **(a) State regulation.** The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> **(b) Federal regulation.** No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as

> amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

The stated purposes of the Act, as expressed in section 1, are to leave regulation and taxation of the insurance business to the states and to ensure that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C § 1011.

In considering the defendants' motion to dismiss the RICO claims, the district court adopted a four-part test announced in *Wexco Inc. v. IMC, Inc.*, 820 F. Supp. 194, 198 (M.D. Pa. 1933) which provides that the McCarran-Ferguson Act precludes federal litigation if:

> (1) the federal statute under which the allegedly precluded action is brought . . . does not specifically relate to the "business of insurance"; (2) the complained-of activities constitute the "business of insurance"; (3) the relevant state has enacted laws for the purpose of regulating these complained-of activities; and (4) the application of the federal statute would, "invalidate, impair(,) or supersede" such laws.

Applying this test, the district court held that RICO does not specifically relate to the business of insurance, thus satisfying the first element of preclusion. As to the second element, the district court found that the plaintiff's complained-of activities did indeed constitute activity within the "business of insurance." Although plaintiff's complaint alleged fraud and

coercion under RICO, the district court reasoned that the defendants' "underlying activity" involves the "promotion and sale of insurance policies to MetLife customers," which is central to the insurance business. Next, the district court found that Pennsylvania had enacted a comprehensive system of insurance regulation so that the third element of the preclusion analysis was met. Finally, the district court held that the application of RICO in an insurance context would "invalidate, impair, or supersede" Pennsylvania's insurance laws. The court arrived at this conclusion by comparing the remedial provisions of civil RICO (namely treble damages, attorney's fees, and costs) with Pennsylvania's insurance laws primarily providing for administrative remedies. It thus reasoned that all the elements of preclusion under the McCarran-Ferguson Act were satisfied which mandated a dismissal of the plaintiff's RICO claims.

The parties to this appeal focus their arguments on two rulings of the district court. First, they disagree as to the scope of the "insurance business" covered by the statute, and whether it applies to the conduct alleged in the complaint. Plaintiff emphasizes that the alleged predicate acts of racketeering activity stem from systematic behavior of "coercive and intimidating tactics" and thus cannot be construed to embrace the business of insurance. Defendants, on the other hand, assert that plaintiff's complaint necessarily relates to the insurance business because it attacks the heart of the insurance industry – specifically, how MetLife manages the licensing of its agents, the agents' authority to solicit insurance, and how agents receive commissions.

Second, both sides contest the proper construction of the "invalidate, impair, or supersede" phrase in 15 U.S.C. § 1012(b) quoted above. Plaintiff urges this court to adopt a "direct conflict" test, in which a federal statute would not "invalidate, impair, or supersede" a state law unless the federal

legislation directly conflicts with substantive duties governed by state insurance law. Conversely, the defendants argue that any analysis of the Act's impairment should not focus on substantive conflict but instead should compare the plaintiff's broad federal RICO remedies with the exclusively administrative scheme adopted under Pennsylvania insurance laws. We will address these two arguments in turn.

A. Preclusion Analysis Under the McCarran-Ferguson Act

As with any other issue of statutory construction, the starting point in the Act's interpretation is the language of the statute itself. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). Section 2(a) of the statute, by its terms, affirmatively subjects the business of insurance to state regulation. 15 U.S.C. § 1012(a). The statute then takes the further step of proscribing unintended federal interference of state insurance laws by a general mandate that no federal law "shall . . . invalidate, impair, or supersede" any state law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). This preclusionary mandate does not apply when the federal statute in question "specifically relates to the business of insurance," in which case normal supremacy rules control and the federal statute trumps conflicting state law.[1]

The Supreme Court has extensively reviewed the Act's legislative history, *see, e.g., United States Dep't of the Treasury*

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[1] Because the plaintiff's complaint is not grounded in federal antitrust laws, we focus our analysis on the first clause of section 1012(b). As the Supreme Court noted, the language of the Act distinguishes preclusion analysis where antitrust laws are at issue. *United States Dep't of the Treasury v. Fabe*, 508 U.S. 491, 504 (1993).

v. Fabe, 508 U.S. 491, 499-500 (1993), *Securities and Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453, 458-59 (1969), and has fully explained the legislative intent behind the statute's preclusionary approach to federal intrusion on state insurance laws:

> [C]ongress purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it "shall be subject to" the laws of the several states in these respects.

Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429-30 (1946) (footnote omitted); *see also Lac D'Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d 1033, 1038-39 (3d Cir. 1988).

If it is determined that the alleged conduct at issue broadly constitutes the "business of insurance," and is therefore subject to state regulation under section 1012(a), the next issue is whether the anti-preemption mandate of section 1012(b) precludes a federal cause of action. Here, the statute makes clear that a party is barred from suing under federal law if three distinct requirements are met. First, the federal law at issue does not "specifically relate" to the business of insurance. Second, the state law regulating the challenged conduct was "enacted for the purpose of regulating the business of insur-

ance." Finally, an application of federal law would "invalidate, impair, or supersede" such state law.[2] *Fabe,* 508 U.S. at 501.

The threshold question in determining whether the anti-preemption mandate of 15 U.S.C. § 1012(b) applies is whether the challenged conduct broadly constitutes the "business of insurance" in the first place. 15 U.S.C. § 1012(a). If the contested activities are wholly unrelated to the insurance business, then the McCarran-Ferguson Act has no place in analyzing federal regulation because only when "[insurance companies] are engaged in the 'business of insurance' does the act apply." *National Securities,* 393 U.S. at 459-60.

In addressing the issue of preclusion under § 1012(b), we read no more into the statute than what it says: unless a federal law specifically relates to the business of insurance, it will not be applied when it "invalidates, impairs, or supersedes"

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[2] We note at the outset that federal courts have seemingly disagreed as to the proper analytic inquiry into McCarran-Ferguson Act preclusion. *See, e.g., Dornberger v. Metropolitan Life Ins. Co.* 961 F. Supp. 506, 516 n. 4 (S.D.N.Y. 1997); *Ambrose v. Blue Cross & Blue Shield of Virginia, Inc.* 891 F. Supp. 1153, 1158 n. 4 (E.D. Va. 1995), *aff'd,* 95 F.3d 41 (4th Cir. 1997) (unpublished per curiam). Some courts draw upon a four-part inquiry similar to that used by district court and the *Wexco* court. *See Kenty v. Bank One, Columbus, N.A.* 92 F.3d 384, 391-92 (6th Cir. 1996); *American-Deposit Corp. v. Schacht,* 84 F.3d 834, 838-43 (7th Cir. 1996); *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.,* 50 F.3d 1486, 1489 (9th Cir. 1995); *Cochran v. Paco, Inc.* 506 F.2d 460, 464 (5th Cir. 1979). Other courts have announced a more truncated three-part test that does not require a specific conclusion that the defendant's conduct constitutes the business of insurance. *See Doe v. Norwest Bank Minn.* 107 F.3d 1297, 1305 n. 8 (8th Cir. 1997); *United States v. Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616, 619 (1st Cir. 1996). Because of this apparent divergence, it is important to discuss our analysis in detail.

a state law "enacted for the purpose of regulating the business of insurance." If the defendant's conduct does not constitute "the business of insurance," then the Act simply does not apply and there is no need to confront preclusion issues under § 1012(b). We cannot imagine how section 1012(b) protects a state law enacted for the purpose of regulating the insurance business when the activity in question does not relate to insurance. To hold otherwise would require us to abandon the structure and purpose of the McCarran-Ferguson Act.

Our reading of the Act is amply supported by its legislative history and Supreme Court precedent. As explained by the Supreme Court:

> The statute did not purport to make the States supreme in regulating all the activities of insurance companies; its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the business of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply. Certainly the fixing of rates is part of this business . . . The selling and advertising of policies, and the licensing of companies and their agents are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which [the Court has previously held] was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement - these were the core of the "business of insurance." Undoubtedly, other activities of

> insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was - it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the "business of insurance."

National Securities, 393 U.S. at 459-60 (citations omitted). Thus, under § 1012(a), the Act initially recognizes that regulating the "business of insurance" rests in the hands of the states.

Of these state "laws relat[ing] to the regulation or taxation" of the insurance business, 15 U.S.C. § 1012(a), the next subsection protects from federal preemption a special class of state laws "enacted . . . for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). But as explained by the Supreme Court, the categories of laws protected by § 1012(b) "necessarily encompasses more than just the 'business of insurance'" and include those laws that possess the "'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Fabe,* 508 U.S. at 505 (citation omitted). The focus of section 1012(b) is not directed toward the business of insurance itself, but rather toward a certain subset of laws relating to insurance regulation under section 1012(a). That demarcation line is found in § 1012(b) as laws "enacted . . . for the purpose of regulating the business of insurance." Thus, even though the state has a law regulating the challenged activity a court must still address whether that law was meant to fall within the ambit of the Act's protection. This is achieved by deciding whether the activity in question constitutes the business of insurance and whether the specific state law was enacted with the "end, intention, or aim of

adjusting, managing, or controlling the business of insurance." *Fabe*, 508 U.S. at 505.

B. Application of the McCarran-Ferguson Act

We first ask whether the challenged activity alleged in the complaint constitutes the "business of insurance" in order to determine whether the Act applies. The Supreme Court has provided guidance as to what conducts falls within "business of insurance" for purposes of the McCarran-Ferguson Act. In *National Securities*, the Court held that the core of the insurance business "centers around the contract of insurance." 393 U.S. at 460. The Court further set forth typical activity that would unquestionably constitute the business of insurance: "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement." *Id.*

Similarly, in *Group Life & Health Ins. Co. v. Royal Drug Co.*, the Supreme Court formulated a three part inquiry in interpreting the phrase "business of insurance" (1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry. 440 U.S. 205, 211-21 (1979); *see also Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). While this inquiry was directed to the antitrust clause in section 1012(b), it may nevertheless provide guidance in a more generalized analysis under this Act. *See Fabe*, 508 U.S. 503-504.[3]

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[3] Some courts have concluded that this three part test is simply not relevant in determining what constitutes the business of insurance in a non-antitrust context. *See, e.g. Doe*, 107 F.3d at 1305 n.8. (continued...)

In this case, we agree with MetLife and its named employees that their activity constitutes the business of insurance. The challenged conduct appearing in the plaintiff's complaint unquestionably centers around the insurance contract, and specifically the activities surrounding its sale and marketing. MetLife's "50/50 plan," "churning" trades, and management's organized intimidation of sales agents, all strike at the insurance business "core" enumerated in *National Securities* because they directly impact on the sale of insurance policies and ultimately affect the relationship between insurer and insured. 393 U.S. at 460. Indeed, whatever the precise contours of the insurance business phrase may be, there is nothing more basically "insurance" than the sale of an insurance contract and the insurer's unique approach in trading, advertising, or valuing that product. We need not delve into a sophisticated three part analysis under *Royal Drug* or *Pireno* to reach this conclusion, but instead look to the defendants' conduct to ascertain whether it centers around the contract of insurance and the relationship between insurer and insured.

Plaintiff's assertion that the challenged activity cannot constitute the business of insurance because it is illegal is unpersuasive. By pointing to a practice that may violate federal law, and claiming that it is not the "business of insurance," plaintiff demonstrates a fundamental misunderstanding of the Act. The language and purpose of the Act speak not of legal insurance transactions, but instead seek to allow states to regulate and enforce the insurance business without fear of

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[3] (...continued)
We disagree. As *Fabe* makes clear, the *Royal Drug* test is only a starting point in the analysis for non-antitrust cases. 508 U.S. 503-5. However, because laws "enacted . . . for the purpose of regulating the business of insurance" necessarily encompass more than just the insurance business, the analysis here is broader.

unintended federal interference. We agree with the Court of Appeals for the Ninth Circuit that if we were to construe the "business of insurance" phrase by reference to federal legality, the statute would be read out of existence. *Merchants*, 50 F.3d at 1490. As noted by the Seventh Circuit Court of Appeals, "it is not helpful to point to a practice forbidden by federal law . . . and observe that this practice is not itself insurance." *NAACP v. American Family Mut. Ins. Co.*, 978 F. 2d 287, 294 (7th Cir. 1992). It is not surprising, therefore, that the majority of courts have rejected this same argument advanced here by the plaintiff, and so do we. *See Dornberger*, 961 F. Supp. at 517 (surveying cases).

C. Preclusion of RICO Claims Under the McCarran-Ferguson Act

Having found that the activity challenged in the complaint constitutes the business of insurance, and is therefore within the ambit of the Act, we consider whether plaintiff's RICO cause of action is precluded under § 1012(b). No party to the appeal argues that RICO specifically relates to insurance. Indeed, virtually every court considering this issue has held that RICO is not a federal statute exempt from the McCarran-Ferguson Act. *See, e.g., Kenty*, 92 F.3d at 391; *Merchants*, 50 F.3d at 1489; *Dornberger*, 961 F. Supp. at 516. Nor is it disputed that the applicable Pennsylvania insurance statute is a state law enacted for the purpose of regulating the insurance business. Thus, all that is left for us to consider under the Act is whether an application of RICO to the instant case would "invalidate, impair, or supersede" state law.

1. Pennsylvania Insurance Laws and RICO

In order to determine whether a cause of action under RICO would "invalidate, impair, or supersede" Pennsylvania

insurance law, we must initially juxtapose RICO with a specific state law enacted for the purpose of regulating the insurance business. The district court, along with both sides on appeal, point to Pennsylvania's Unfair Insurance Practices Act, 40 Pa. Cons. Stat. Ann. §§ 1171.1 to 1171.15 (West 1992) ("UIPA"), as the relevant state law governing MetLife's challenged activity. The Act prohibits persons from engaging in unfair or deceptive practices in the business of insurance. *Id.* § 1171.4. An exhaustive list of activity is set forth in section 1171.5 as deceptive or unfair practices forbidden under section 1171.4. The UIPA further empowers the Pennsylvania insurance commissioner to investigate illegal insurance practices and to take certain remedial actions including the imposition of monetary penalties, "cease and desist" orders, the suspension or revocation of an insurance license, or additional injunctive relief. *Id.* §§ 1171.7 to 1171.11.

By judicial precedent, the Pennsylvania Insurance Commissioner alone may seek to enforce the UIPA. *See Wright v. North Am. Life Assurance Co.*, 372 Pa. Super. 272, 279, 539 A.2d 434, 438 (1988) ("[T]he provisions of this statute were not intended to confer a right of private action. Rather, the Unfair Insurance Practices Act vests enforcement powers in the Pennsylvania Insurance Commission"); *Wexco*, 820 F. Supp. at 203-204. Pennsylvania courts, however, have not barred common law actions for fraud and deceit arising out of insurance practices even though the UIPA does not allow private causes of action. *Wright*, 372 Pa. Super. at 279, 539 A.2d at 438. These private lawsuits, in addition to other private actions authorized by Pennsylvania law,[4] provided the only

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[4] In addition to common law fraud and deceit, Pennsylvania courts have sanctioned the use of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Cons. Stat. Ann.

(continued...)

judicial remedies available to plaintiffs victimized by illegal insurance practices.

RICO, on the other hand, grants a private cause of action to any person injured as a result of a pattern of racketeering activity. 18 U.S.C. § 1964(c). The statute also authorizes the award of treble damages, attorney's fees, and costs. *Id.* Pursuant to 18 U.S.C. § 1961(2), a pattern of racketeering activity is defined as at least two acts of illegal activity identified in section 1961(1) and includes both mail fraud and wire fraud. Beyond the general classes of crimes enumerated in section 1961(1), RICO does not specifically address insurance practices.

2. "Invalidate, Impair, or Supersede"

Given this comparison of RICO with the UIPA, the legal question before us is whether allowing plaintiff's suit under RICO would "invalidate, impair, or supersede" Pennsylvania law as that phrase is understood under the Act. The phrase "invalidate, impair, or supersede" is not defined anywhere in the Act and we are faced with the considerable task of grappling with its construction in the present context.

Courts of Appeals jurisprudence is in disarray as to the extent and meaning of invalidate, impair or supersede under the Act. One line of cases, spearheaded by the first, seventh, and ninth circuit Courts of Appeals, looks to a direct conflict in the substantive provisions of the federal and state statutes at issue. *See Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1491-92 (9th Cir. 1995); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 295-97 (7th Cir.

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[4] (...continued)
§§ 201-1 to 201-9.2 (West 1993), to allow aggrieved insureds recovery against insurance fraud. *See Pekular v. Eich*, 355 Pa. Super. 276, 285-90, 513 A.2d 427, 432-41 (1986).

1992); *Villafane-Neriz v. FDIC*, 75 F.3d 727, 736 (1st Cir. 1996). These courts typically reason that the Act is a form of inverse preemption where federal laws must yield to state laws when the state enacts a statute for the purpose of regulating the insurance business and the federal statute does not specifically apply to insurance. Logic then drawn from ordinary rules of federal preemption under the supremacy clause is reversed so that a state law will not preempt a federal law unless the laws of both sovereigns directly conflict in terms of governing the behavior of insurance carriers. *See American Family*, 978 F.2d at 296 (citing *Silkwood v Kerr-McGee Corp.*, 464 U.S. 238 (1984)). The Act's preemption is appropriate, these courts will conclude, where it is simply not possible for the insurance carrier to comply with both state and federal law. However, because "duplication is not conflict," differences in state remedies and federal remedies could not be the bases of preemption when both statutes proscribe the same insurance practices. *Id.*

In further support for the foregoing analysis, these courts reason that the Act was not intended to cede the entire field of insurance regulation to the states. Where a state law or regulation is silent as to remedy, or does not provide a private cause of action, federal regulation will not be preempted. *Merchants.* 50 F.3d 1492. A contrary interpretation of the statute, these courts will conclude, would essentially rewrite the Act to read: No federal statute shall be construed to apply to the business of insurance, unless such federal statute specifically relates to the business of insurance. The Congress did not so provide and therefore state silence surrounding the assurance of a private remedy does not provide the basis for federal preemption. *Id.*

The fourth, eighth, and to a certain extent the sixth, circuit Courts of Appeals disagree. When state insurance laws provide for enforcement through an administrative process to

the exclusion of private damage actions, treble damages, attorney's fees, and costs, these courts reason that RICO's expanded remedial framework cannot coexist with state law based on a plain meaning of the words "invalidate," "impair," and "supersede."[5] *See Doe v. Norwest Bank Minn.*, 107 F.3d 1297, 1307 (8th Cir. 1997); *Ambrose v. Blue Cross & Blue Shield of Virginia, Inc.*, 891 F. Supp. 1153, 1165 (E.D.Va. 1995), *aff'd*, 95 F.3d 41 (4th Cir. 1997) (unpublished per curiam). They say the Act was designed to allow state legislatures to adopt their own regulatory framework governing how insurance grievances are redressed. If a state chose a private forum for redress through administrative enforcement, then the Act would protect such a decision and federal law would not be allowed to upset this balance. Thus, they conclude that the drastic nature of federal remedies is directly relevant to assessing the application of the "invalidate, impair, or supersede" phrase in the Act. *See Doe*, 107 F.3d at 1307; *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 392 (6th Cir. 1996).

To be sure, a direct conflict in the substantive provisions of RICO with those provided for in the UIPA would fall within the ambit of laws that invalidate, impair, or supersede state insurance law. If, for example, Pennsylvania explicitly authorizes certain insurance practices that RICO would clearly prohibit, the McCarran-Ferguson Act would eviscerate the federal cause of action. *Cf. American Family*, 978 F.2d at 297 ("If Wisconsin wants to authorize redlining, it need only say so; if it does, any challenge to that practice under the auspices of the Fair Housing Act becomes untenable."). This would be the

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[5] "Invalidate" is defined as "to weaken or make valueless;" "impair" means to "make worse . . . diminish in quantity, value, excellence or strength;""supersede" means to "make obsolete, inferior, or outmoded." Webster's Third New International Dictionary 1199, 1131, 2295 (1986). *See Ambrose*, 891 F. Supp. at 1165.

case no matter how the phrase "invalidate, impair, or supersede" is to be construed, as we cannot imagine any more impairment then an absolute contradiction in legal fiat concerning insurance practices. But we cannot find any such conflict in the UIPA when compared to RICO, at least in the present context. Consequently, the more critical issue is whether we may look to divergent state and federal implementation of similar legal norms.

Part of this puzzle has been answered by the Supreme Court in *National Securities*. There, the Securities and Exchange Commission sought to unwind a merger between two insurance companies based on violations of Rule 10b-5. The merger had already been approved by the Arizona State Director of Insurance in his capacity as licensor of insurers within the state. This approval was predicated upon a finding that the merger would not "substantially reduce the security of and service to be rendered to policyholders." 393 U.S. at 462 (quoting Ariz. Rev. Stat. Ann. § 20-731(B)(3) (1969)).

Upon the foregoing factual scenario, the Supreme Court phrased the issue as whether the "McCarran-Ferguson Act bars a federal remedy which affects a matter subject to state insurance regulation." *Id.* The Court reasoned that any "impairment" in the case would be indirect—the federal government sought to protect security holders while the Arizona sought to safeguard insurance policy holders. *Id.* at 463.

Moreover, the Court noted that there was no true "conflict" in remedies at all because "Arizona has not commanded something which the Federal Government seeks to prohibit." *Id.* at 463. The Court also found that the paramount federal interest in prohibiting securities fraud was perfectly compatible with the state interest in protecting policyholders. Thus, because of the nature of the indirect impairment, and

because "the remedy the Commission seeks does not affect a matter predominantly of concern to policyholders alone," the Court held that it saw no reason to emasculate securities laws through an application of the McCarran-Ferguson Act. In the end, the Supreme Court "simply [could] not see the conflict" and allowed the federal government to unwind the merger notwithstanding Arizona's explicit approval. *Id.*

We too cannot see the conflict in this case and find no invalidation, impairment, or supersedence, however defined, of Pennsylvania insurance law. The federal policies embodied in RICO, namely, the grant of a liberal federal remedy to those who have been victimized by organized crime, *see Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 487 (1985), are in no way inconsistent with the stated purpose of the UIPA, which is to "regulate trade practices in the business of insurance . . . by defining . . . such practices . . . which constitute unfair methods of competition or unfair or deceptive acts . . ." 40 Pa. Cons. Stat. Ann. § 1171.2; *see also D'Ambrosio v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 494 Pa. 501, 508, 431 A.2d 966, 970 (1981) (stating that the UIPA serves to deter bad faith conduct in the insurance business). Borrowing from the Supreme Court's analysis in *National Securities*, the RICO remedy does not exclusively affect matters predominantly of concern to those protected only by the UIPA. 393 U.S. at 463. RICO, whether in effect or purpose, is not an attempt to regulate the "sphere reserved primarily to the States by the McCarran-Ferguson Act." *Id.*

Of course, this court would be remiss not to recognize MetLife's argument that an application of RICO may affect, in a more abstract sense, Pennsylvania's overall implementation of insurance norms and is decision to enforce certain insurance violations in an administrative context. As acknowledged by the Court of Appeals for the Seventh Circuit:

> Undoubtedly there is a sense in which any overlap between state and federal law upsets a balance struck by one of the two legislatures . . . Laws enforced only be administrative agencies with limited budgets are less potent than laws enforced by both agencies and private litigants. One could say that a federal rule increasing the probability that a state norm will be vindicated (or augmenting the damages assessed in the event of a violation) conflicts with a decision by the state that remedies should be limited or rare.

American Family, 978 F.2d at 295 (citations omitted). While such an argument may be compelling, there is no place for it in the present context. We find no indication, through legislative intent or judicial interpretation, that Pennsylvania's non-recognition of a private remedy under the UIPA represents a reasoned state policy of exclusive administrative enforcement or that the vindication of UIPA norms should be limited or rare. Private actions for fraud and deceit in the insurance business coexist with the UIPA even though the same conduct may be covered by both the common law and the UIPA. *See, e.g.*, 40 Pa. Cons. Stat. Ann §§ 1171.5(1) to 1171.5(3) (generally prohibiting "false," "misleading" or misrepresentative statements and omissions). In addition, Pennsylvania courts have held that the state's general consumer protection statute, 73 Pa. Cons. Stat. Ann. §§ 201-1 to 201-9.2, provides a private remedy and treble damages for victims of insurance fraud. *See Peckular*, 355 Pa. Super. at 285-90, 512 A.2d at 430-41. This certainly undercuts any purported balance struck by the Pennsylvania legislature favoring administrative enforcement to the exclusion of private damages actions and we see no reason why a federal private right of action cannot coexist with the UIPA in these circumstances.

We therefore conclude that a RICO cause of action and remedy would not "invalidate, impair or supersede" Pennsylvania's scheme of insurance regulation in this context. Because we need not reach the issue here, we will leave for another day the question of whether different federal and state remedies could ever be the basis for preclusion under the Act. Accordingly, the district court's dismissal of the plaintiff's RICO claims for failure to state a claim will be reversed to the extent it relied on the McCarran-Ferguson Act as a basis for preclusion. We will also reverse the district court's denial of the motion to amend the complaint since the amendment would no longer be futile under our application of the McCarran-Ferguson Act. In so doing, however, we express no opinion as to whether the plaintiff has stated proper claims under RICO law itself.

III. The Defamation Claim

The Plaintiff's complaint also included a defamation claim against MetLife alone based on Pennsylvania law. In due course, MetLife filed a motion for summary judgment on such a claim which was granted. We will review plaintiff's appeal of this order under a summary judgment standard. The district court's grant of summary judgement will be affirmed if, after a plenary review of the record, there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). This court will not weigh the evidence in the record itself, but instead determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 247 (1986); *Petruzzi's IGA v. Darling-Delaware*, 998 F.2d 1224, 1230 (3d Cir. 1993). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248.

Plaintiff's defamation claim arises out of the following circumstances as set forth in the affidavit of Fred Newstrom ("Newstrom"), a sales agent for MetLife who worked with plaintiff at one time. The affidavit is based on personal knowledge, as required by Fed. R. Civ. P. 56(e).

About August 23, 1993, MetLife convened a meeting of its sales agents in the Pittsburgh region. Several hundred agents were in attendance, including Newstrom. There were various speakers, including Gary Antonino ("Antonino"), Pittsburgh Regional Manager, and Robert Crimmons, MetLife Executive Vice President for Personal Insurance. Other senior managers of MetLife were also on the dais.

During the course of an address given to the agents by Antonino, a brief clip from the movie Ghostbusters was shown. In the clip, an animated ghost figure known to those familiar with the movie as "Slimer" charges down a long hallway and attacks one of the other characters. "Slimer" is a short, fat,

malformed green ghost who attacks his victims by covering them with a slime or gooey material.

Immediately following the showing of the movie clip, Antonino made statements to the audience about the way the media were portraying MetLife.

The affidavit then goes on:

> At or about the time of this meeting at the Royce Hotel, MetLife was the subject of an ongoing investigative report on the Channel 11 news, in which statements were made that MetLife was under investigation by the Pennsylvania Insurance Department for illegal deceptive sales and trade practices.
>
> Also during this time period, Antonino was letting it be known through the region that he "had it in" for Sabo, and that Sabo was at fault for all of MetLife's difficulties.
>
> Based upon the showing of the movie clip and the statements made by Antonino immediately thereafter, Hermann understood Antonino to be saying that it was Sabo [plaintiff] who was spreading false information to the media, and that Sabo was attempting to wrongfully bring about the demise of MetLife.

App. at 487 (alteration in original). After the meeting, other MetLife agents who attended the meeting informed Newstrom that they also believed that Antonino's message was that Sabo was responsible for the information about MetLife in the media. *Id.*

In addition to the affidavit of Newstrom, an affidavit by agent Ronald Herrmann was filed. It also was based on personal knowledge. In it he recited that he also attended the

meeting and that he also understood Sabo to be Slimer and the evil presence at MetLife. However, Herrmann did not state that Antonio "had it in" for the plaintiff.

A copy of the Report and Recommendation of the Magistrate Judge who heard the matter recommended to the district court that summary judgment be granted to MetLife on the defamation claim based solely on the ground that there was no support in the record for a finding that plaintiff was the intended target of any comments made during the "Ghostbuster" presentation. Thereafter, the district court granted MetLife's motion for summary judgment on the defamation claim solely on the ground recommended by the Magistrate Judge.

We note at the outset of this appeal that in an action for defamation under Pennsylvania law, the plaintiff has the burden of proving: (1) the defamatory character of the communications; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion. 42 Pa. Cons. Stat. Ann. § 8343(a).

We analyze the record keeping in mind that we are reviewing summary judgment and that the sole basis for granting the motion in the district court was the absence of evidence to meet this fifth requirement of the Pennsylvania statute, *viz.*, understanding by the recipients of it that it was intended to be applied to plaintiff.

Plaintiff concedes that the alleged defamatory matter, standing on its own, is insufficient to support a jury finding that it refers to him. However, he argues that the defamation analysis must nevertheless proceed as to the fifth element if the

defamatory statements may point to the defamed through "description or circumstances tending to identify him." *Cosgrove Studio & Camera Shop, Inc. v. Pane*, 408 Pa. 314, 319, 182 A.2d 751, 753 (1962). We turn to that contention.

Taking the recited contents of the affidavits as true, we think it reasonable to infer at this point that the affiants were aware at the time of the meeting of rumors with respect to MetLife's controversy with the plaintiff. When this circumstance is combined with the contents of the movie clip and Antonino's remarks thereafter, a genuine issue of material fact was created with respect to the fifth requirement of the Pennsylvania statute. Consequently, the resolution of that factual issue was for the finder of fact. Thus, summary judgment should not have been granted based on a failure to meet this requirement.

But our conclusion that the district court erred in its ruling on the foregoing issued does not end the matter. We cannot tell from the record whether MetLife asserted grounds other than a failure to meet the fifth element of the Pennsylvania statute in support of its summary judgment motion. Thus, we conclude that our reversal of the order granting summary judgment must be without prejudice to the district court's right to consider other asserted grounds for summary judgment, if any, that are still before it.

IV. Conclusion

The order of the district court dismissing plaintiff's RICO claim will be reversed, and the order denying plaintiff's motion to amend the complaint will be vacated. The order of the district court granting MetLife's motion for summary judgment on plaintiff's defamation claim will be reversed to the extent it was based on the ground relied on by the district court. It is further ordered that this ruling is without prejudice to a

consideration by the district court of other asserted grounds, if any, for summary judgment.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D – DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 31, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-3663

RICHARD SABO
Appellant

v.

METROPOLITAN LIFE INSURANCE COMPANY; GARY ANTONINO; JOEL SHERMAN, RONALD SCHRAM; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, RENDELL, and SEITZ, Circuit Judges

The petition for rehearing filed by appellant [sic] in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: March 31, 1998

*Hon. Collins J. Seitz, Senior U.S. Circuit Judge for the Third Circuit, was a member of the original panel. His vote is limited to panel rehearing.

APPENDIX E – RELEVANT STATUTES

THE McCARRAN-FERGUSON ACT,
15 U.S.C.§ 1011 TO § 1015

§ 1011. Declaration of policy

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

§ 1014. Effect on other laws

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

§ 1015. "State" defined

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS, 18 U.S.C. § 1861 to § 1864

§ 1961. Definitions

As used in this chapter-

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-65 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section

1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phono records, computer programs, or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments

and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprison-

ment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency

so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of

which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provision of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law -

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any -

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes–

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (*l*) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section–

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that–

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to

which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to–

> (1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to–

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter.

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (*l*), no party claiming an interest in property subject to forfeiture under this section may–

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of

petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(*l*)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held

within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that–

> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without

cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant–

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been place beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not

limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate Untied States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

PENNSYLVANIA STATE RICO STATUTE, 18 Pa. S. § 911

§ 911. Corrupt Organizations

(a) Findings of fact. - The General Assembly finds that:

(1) organized crime is a highly sophisticated, diversified, and widespread phenomenon which annually drains billions of dollars from the national economy by various patterns of unlawful conduct including the illegal use of force, fraud, and corruption;

(2) organized crime exists on a large scale within the Commonwealth of Pennsylvania, engaging in the same patterns of unlawful conduct which characterizes its activities nationally;

(3) the vast amounts of money and power accumulated by organized crime are increasingly used to infiltrate and corrupt legitimate businesses operating within the Commonwealth, together with all of the techniques of violence, intimidation, and other forms of unlawful conduct through which such money and power are derived;

(4) in furtherance of such infiltration and corruption, organized crime utilizes and applies to its unlawful purposes laws of the Commonwealth of Pennsylvania conferring and relating to the privilege of engaging in various types of business and designed to insure that such businesses are conducted in furtherance of the public interest and the general economic welfare of the Commonwealth;

(5) such infiltration and corruption provide an outlet for illegally obtained capital, harm innocent investors, entrepreneurs, merchants and consumers, interfere with free competition, and thereby constitute a substantial danger to the economic and general welfare of the Commonwealth of Pennsylvania; and

(6) in order to successfully resist and eliminate this situation, it is necessary to provide new remedies and procedures.

(b) Prohibited activities. -

(1) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity in which such person participated as a principal, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in the acquisition of any interest in, or the establishment or operation of, any enterprise: Provided, however, That a purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issue held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity after such purchase, do not amount in the aggregate to 1% of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer: Provided, further, That if, in any proceeding involving an alleged investment in violation of this subsection, it is established that over half of the defendant's aggregate income for a period of two or more years immediately preceding such investment was derived from a pattern of racketeering activity, a rebuttable presumption shall arise that such investment included income derived from such pattern of racketeering activity.

(2) It shall be unlawful for any person through a pattern of racketeering activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.

(3) It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

(4) It shall be unlawful for any person to conspire to violate any of the provisions of paragraphs (1), (2) or (3) of this subsection.

(c) Grading. - Whoever violates any provision of subsection (b) of this section is guilty of a felony of the first degree. A violation of this subsection shall be deemed to continue so long as the person who committed the violation continues to receive any benefit from the violation.

(d) Civil remedies. -

(1) The several courts of common pleas, and the Commonwealth Court, shall have jurisdiction to prevent and restrain violations of subsection (b) of this section by issuing appropriate orders, including but not limited to:

(i) ordering any person to divest himself of any interest direct or indirect, in the enterprise; imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in; and

(ii) making due provision for the rights of innocent persons, ordering the dissolution of the enterprise, ordering the denial, suspension or revocation of charters of domestic corporations, certificates of authority authorizing foreign corporations to do business within the Commonwealth of Pennsylvania; or prohibiting the enterprise from engaging in any business.

(2) In any proceeding under this subsection, the court shall proceed as soon as practicable to the hearing and

determination thereof. Pending final determination, the court may enter preliminary or special injunctions, or take such other actions, including the acceptance of satisfactory performance bonds, as it may deem proper.

(3) A final judgment or decree rendered in favor of the Commonwealth of Pennsylvania in any criminal proceeding under this section shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding under this section.

(4) Proceedings under this subsection, at pretrial, trial and appellate levels, shall be governed by the Pennsylvania Rules of Civil Procedure and all other rules and procedures relating to civil actions, except to the extent inconsistent with the provisions of this section.

(e) Enforcement.-

(1) The Attorney General shall have the power and duty to enforce the provisions of this section, including the authority to issue civil investigative demands pursuant to subsection (f), institute proceedings under subsection (d), and to take such actions as may be necessary to ascertain and investigate alleged violations of this section.

(2) The Attorney General and the district attorneys of the several counties shall have concurrent authority to institute criminal proceedings under the provisions of this section.

(3) Nothing contained in this subsection shall be construed to limit the regulatory or investigative authority of any department or agency of the Commonwealth whose function might relate to persons, enterprises, or matters falling within the scope of this section.

(f) Civil investigative demand.-

(1) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary material relevant to a racketeering investigation, he may issue in writing, and cause to be served upon such person or enterprise, a civil investigative demand requiring the production of such material for examination.

(2) Each such demand shall:

(i) state the nature of the conduct constituting the alleged racketeering violation which is under investigation, the provision of law applicable thereto and the connection between the documentary material demanded and the conduct under investigation;

(ii) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(iii) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction;

(iv) identify a racketeering investigator to whom such material shall be made available; and

(v) contain the following statement printed conspicuously at the top of the demand: "You have the right to seek the assistance of any attorney and he may represent you in all phases of the racketeering investigation of which this civil investigative demand is a part."

(3) No such demand shall:

(i) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by any court in connection with a grand jury investigation of such alleged racketeering violation; or

(ii) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by any court in connection with a grand jury investigation of such alleged racketeering violation.

(4) Service of any such demand or any petition filed under this subsection shall be made in the manner prescribed by the Pennsylvania Rules of Civil Procedure for service of writs and complaints.

(5) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(6)(i) Any party upon whom any demand issued under this subsection has been duly served shall make such material available for inspection and copying or reproduction to the racketeering investigator designated therein at the principal place of business of such party, or at such other place as such investigator and such party thereafter may agree or as the court may direct pursuant to this subsection, on the return date specified in such demand. Such party may upon agreement of the investigator substitute copies of all or any part of such material for the originals thereof.

(ii) The racketeering investigator to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for its return pursuant to this subsection. The

investigator may cause the preparation of such copies of such documentary material as may be required for official use. While in the possession of the investigator, no material so produced shall be available for examination, without the consent of the party who produced such material, by any individual other than the Attorney General or any racketeering investigator. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the investigator shall be available for examination by the party who produced such material or any duly authorized representatives of such party.

(iii) Upon completion of:

(A) the racketeering investigation for which any documentary material was produced under this subsection; and

(B) any case or proceeding arising from such investigation;

the investigator shall return to the party who produced such material all such material other than copies thereof made pursuant to this subsection which have not passed into the control of any court or grand jury through introduction into the record of such case or proceeding.

(iv) When any documentary material has been produced by any party under this subsection for use in any racketeering investigation, and no case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such party shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material, other than copies thereof made pursuant to this subsection so produced by such party.

(7) Whenever any person or enterprise fails to comply with any civil investigative demand duly served upon him under this subsection or whenever satisfactory copying or reproduction of any such material cannot be done and such party refuses to surrender such material, the Attorney General may file, in the court of common pleas for any county in which such party resides or transacts business, and serve upon such party a petition for an order of such court for the enforcement of this subsection, except that if such person transacts business in more than one county such petition shall be filed in the county in which the party maintains his or its principal place of business.

(8) Within 20 days after the service of any such demand upon any person or enterprise, or at any time before the return date specified in the demand, whichever period is shorter, such party may file, in the court of common pleas of the county within which such party resides or transacts business, and serve upon the Attorney General a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this subsection or upon any constitutional or other legal right or privilege of such party.

(9) At any time during which the Attorney General is in custody or control of any documentary material delivered by any party in compliance with any such demand, such party may file, in the court of common pleas of the county within which such documentary material was delivered, and serve upon the Attorney General a petition for an order of such court

requiring the performance of any duty imposed by this subsection.

(10) Whenever any petition is filed in any court of common pleas under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and, after a hearing at which all parties are represented, to enter such order or orders as may be required to carry into effect the provisions of this subsection.

(g) Immunity.- Whenever any individual refuses, on the basis of his privilege against self-incrimination, to comply with a civil investigative demand issued pursuant to subsection (f) or to testify or produce other information in any proceeding under subsection (d), the Attorney General may invoke the provisions of 42 Pa.C.S. § 5947 (relating to immunity of witnesses).

(h) Definitions.- As used in this section:

(1) "Racketeering activity" means:

(i) any act which is indictable under any of the following provisions of this title:

Chapter 25 (relating to criminal homicide)

Section 2706 (relating to terroristic threats)

Chapter 29 (relating to kidnapping)

Chapter 33 (relating to arson, etc)

Chapter 37 (relating to robbery)

Chapter 39 (relating to theft and related offenses)

Section 4108 (relating to commercial bribery and breach of duty to act disinterestedly)

Section 4109 (relating to rigging publicly exhibited contest)

Section 4117 (relating to insurance fraud)

Chapter 47 (relating to bribery and corrupt influence)

Chapter 49 (relating to falsification and intimidation)

Section 5111 (relating to dealing in proceeds of unlawful activities)

Section 5512 through 5514 (relating to gambling)

Chapter 59 (relating to public indecency)

(ii) any offense indictable under section 13 of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act (relating to the sale and dispensing of narcotic drugs);

(iii) any conspiracy to commit any of the offenses set forth in subparagraphs (i) and (ii) of this paragraph; or

(iv) the collection of any money or other property in full or partial satisfaction of a debt which arose as the result of the lending of money or other property at a rate of interest exceeding 25% per annum or the equivalent rate for a longer or shorter period, where not otherwise authorized by law.

Any act which otherwise would be considered racketeering activity by reason of the application of this paragraph, shall not be excluded from its application solely because the operative acts took place outside the jurisdiction of this Commonwealth, if such acts would have been in violation of the law of the jurisdiction in which they occurred.

(2) **"Person"** means any individual or entity capable of holding a legal or beneficial interest in property.

(3) **"Enterprise"** means any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity, engaged in commerce and includes legitimate as well as illegitimate entities and governmental entities.

(4) **"Pattern of racketeering activity"** refers to a course of conduct requiring two or more acts of racketeering activity one of which occurred after the effective date of this section.

(5) **"Racketeering investigator"** means an attorney, investigator or investigative body so designated in writing by the Attorney General and charged with the duty of enforcing or carrying into effect the provisions of this section.

(6) **"Racketeering investigation"** means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this section or of any order, judgment, or decree of any court duly entered in any case or proceeding arising under this section.

(7) **"Documentary material"** means any book, paper, record, recording, tape, report, memorandum, written communication, or other document relating to the business affairs of any person or enterprise.

(8) **"Organized crime"** means any person or combination of persons engaging in or having the purpose of engaging in conduct which violates any provision of subsection (b) and also includes **"organized crime"** as defined in section 5702 (relating to definitions).

PENNSYLVANIA UNFAIR INSURANCE PRACTICES ACT, 40 Pa. S. § 1171 to § 1171.15

§ 1171.1. Short title

This act shall be known and may be cited as the "Unfair Insurance Practices Act."

§ 1171.2. Declaration of purpose

The purpose of this act is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining or providing for the determination of all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting trade practices so defined and determined.

§ 1171.3. Definitions

As used in this act:

"Abuse" has the meaning given in 23 Pa.C.S. § 6102(a) (relating to definitions), notwithstanding the limited applicability provision in paragraph (5) of the definition of "abuse" in 23 Pa.C.S. § 6102(a)(5).

"Commissioner" means the insurance commissioner of the Commonwealth of Pennsylvania.

"Family or household member" has the meaning given in 23 Pa.C.S. § 6102(a) (relating to definitions).

"Insurance policy" or **"Insurance Contract"** means any contract of insurance, indemnity, health care, suretyship, title insurance, or annuity issued, proposed for issuance or intended for issuance by any person.

"Person" means any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds

insurer, fraternal benefit society, beneficial association and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters and also means health care plans. As defined in 40 Pa.C.S.A. Ch. 61 relating to hospital plan corporations, 40 Pa.C.S.A. Ch. 63 relating to professional health services plan corporations, 40 Pa.C.S.A. Ch. 65 relating to fraternal and beneficial societies 40 Pa.C.S.A. Ch. 67 relating to beneficial societies and the act of December 29, 1972 (P.L. 1701, No. 364), known as the "Voluntary Nonprofit Health Service Act of 1972." For purposes of this act, health care plans, fraternal benefit societies and beneficial societies shall be deemed to be engaged in the business of insurance.

"Renewal" or **"to renew"** means the issuance and delivery by an insurer of a policy superseding at the end of the policy period a policy previously issued and delivered by the same insurer, such renewal policy to provide types and limits of coverage at least equal to those contained in the policy being superseded, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term with types and limits of coverage at least equal to those contained in the policy being extended: Provided, however, That any policy with a policy period or term of less than twelve months or any period with no fixed expiration date shall for the purpose of this act be considered as if written for successive policy periods or terms of twelve months.

"Victim" means an individual who is or has been subjected to abuse.

"Victim of abuse" means an individual who is a victim or an individual who seeks or has sought medical or psychological treatment for abuse, protection from abuse or shelter from abuse.

§1171.4. Unfair methods of competition and unfair or deceptive acts or practices prohibited

No person shall engage in this state in any trade practice which is defined or determined to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance pursuant to this act.

§ 1174.5. Unfair methods of competition and unfair or deceptive acts or practices defined

(a) **"Unfair methods of competition"** and **"unfair or deceptive acts or practices"** in the business of insurance means:

(1) Making, publishing, issuing or circulating any estimate, illustration, circular, statement, sales presentation, omission comparison which:

(i) Misrepresents the benefits, advantages, conditions or terms of any insurance policy;

(ii) Misrepresents the premium overcharge commonly called dividends or share of the surplus to be received on any insurance policy;

(iii) Makes any false or misleading statements as to the dividends or share of surplus previously paid on any insurance policy;

(iv) Is misleading or is a misrepresentation as to the financial condition of any person, or as to the legal reserve system upon which any insurer operates;

(v) Uses any name or title of any insurance policy or class of insurance policies misrepresenting the true nature thereof;

(vi) Is a misrepresentation for the purpose of inducing or tending to induce the lapse, forfeiture, exchange, conversion or surrender of any insurance policy;

(vii) Is a misrepresentation for the purpose of effecting a pledge or assignment of or effecting a loan against any insurance policy; or

(viii) Misrepresents any insurance policy as being shares of stock.

(2) Making, issuing, publishing or circulating in any manner an advertisement, announcement or statement containing any representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business which is untrue, deceptive or misleading.

(3) Making, issuing, publishing or circulating any oral or written statement which is false or maliciously critical of or derogatory to the financial condition of any person, and which is calculated to injure such person.

(4) Entering into any agreement to commit, or by any concerted action committing, any act or boycott, coercion or intimation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

(5) Knowingly filing with any supervisory or other public official, or knowingly making, issuing, publishing or circulating any false material statement of fact as to the financial condition of a person, or knowingly making any false entry of a material fact in any book, report or statement of any person, or knowingly omitting to make a true entry of any material fact pertaining to the business of such person in any book, report or statement of such person.

(6) Issuing or delivering or permitting agents, officers or employees to issue or deliver agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or securities or any special or

advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance.

(7) Unfairly discriminating by means of:

(i) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract; or

(ii) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy, fees or rates charged for any policy or contract of insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(iii) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard with regard to underwriting standards and practices or eligibility requirements by reason of race, religion, nationality, or ethnic group, age, sex, family size, occupation, place of residence or marital status. The terms "underwriting standards and practices" or "eligibility rules" do not include the promulgation of rates if made or promulgated in accordance with the appropriate rate regulatory act of this commonwealth and regulations promulgated by the commissioner pursuant to such act.

(8) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of insurance, or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon, or paying or allowing, or giving or offering to pay, allow or give as inducement to such insurance, any rebate of premiums payable on the contract, or any special favor or

advantage in the dividends or other benefits thereon, or any valuable consideration, inducement or anything of value whatsoever which is not specified in the contract.

(9) Cancelling any policy of insurance covering owner-occupied private residential properties or personal property of individuals that has been in force for sixty days or more or refusing to renew any such policy unless the policy was obtained through material misrepresentation, fraudulent statements, omissions or concealment of fact material to the acceptance of the risk or to the hazard assumed by the company; or there has been a substantial change or increase in hazard in the risk assumed by the company subsequent to the date the policy was issued; or there is a substantial increase in hazards insured against by reason of wilful or negligent acts or omissions by the insured; or the insured has failed to pay any premium when due whether such premium is payable directly to the company or its agent or indirectly under any premium finance plan or extension of credit; or for any other reasons approved by the commissioner pursuant to rules and regulations promulgated by the commissioner. No cancellation or refusal to renew by any person shall be effective unless a written notice of the cancellation or refusal to renew is received by the insured either at the address shown in the policy or at a forwarding address. Such notice shall:

(i) Be approved as to form by the insurance commissioner prior to use.

(ii) State the date, not less than thirty days after the date of delivery or mailing on which such cancellation or refusal to renew shall become effective.

(iii) State the specific reason or reasons of the insurer for cancellation or refusal to renew.

(iv) Advise the insured of his right to request, in writing, within ten days of the receipt of the notice

of cancellation or intention not to renew that the insurance commissioner review the action of the insurer.

(v) Advise the insured of his possible eligibility for insurance under the act of July 31, 1968 (P.L. 738, No. 233), known as "The Pennsylvania Fair Plan Act," or the Pennsylvania Assigned Risk Plan.

(vi) Advise the insured in a form commonly understandable of the provisions of subparagraphs (II), (III), and (IV) of this paragraph as they limit permissible time and reasons for cancellation.

(vii) Advise the insured of the procedures to be followed in prosecuting an appeal.

(10) Any of the following acts if committed or performed with such frequency as to indicate a business practice shall constitute unfair claim settlement or compromise practices.

(i) Misrepresenting pertinent facts or policy or contract provisions relating to coverages at issue.

(ii) Failing to acknowledge and act promptly upon written or oral communications with respect to claims arising under insurance policies.

(iii) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

(iv) Refusing to pay claims without conducting a reasonable investigation based upon all available information.

(v) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed and communicated to the company or its representative.

(vi) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which the company's liability under the policy has become reasonably clear.

(vii) Compelling persons to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts due and ultimately recovered in actions brought by such persons.

(viii) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.

(ix) Attempting to settle or compromise claims on the basis of an application which was altered without notice to or knowledge or consent of the insured of such alteration at the time such alteration was made.

(x) Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made.

(xi) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants to induce or compel them to accept settlements or compromises less than the amount awarded in arbitration.

(xii) Delaying the investigation or payment of claims by requiring the insured, claimant or the physician or either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

(xiii) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage or under other policies of insurance.

(xiv) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(xv) Refusing payment of a claim solely on the basis of an insured's request to do so unless:

(a) The insured claims sovereign, eleemosynary, diplomatic, military service, or other immunity from suit or liability with respect to such claim;

(b) The insured is granted a right under the policy of insurance to consent to settlement of claims; or

(c) The refusal of payment is based upon the insurer's independent evaluation of the insured's liability based upon all available information.

(11) Failure of any person to maintain a complete record of all the complaints which it has received during the preceding four years. This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of these complaints and the time it took to process each complaint. For purposes of this paragraph, "complaint" means any written communication primarily expressing a grievance.

(12) Making false or fraudulent statements or representations on or relative to an application for an insurance policy, for the purpose of obtaining a fee, commission, money or other benefit from any insurers, agent, broker or individual.

(13) Making, issuing, publishing or circulating in any manner an advertisement, announcement or statement offering permanent life insurance to persons fifty years of age or older without accompanying disclosures of any applicable reduction in the face amount payable and the period thereof.

(14)(i) Taking any of the following actions because the insured or applicant for an insurance policy or insurance contract is the victim of abuse:

(A) Denying, refusing to issue, refusing to renew, refusing to reissue or cancelling or terminating an insurance policy or insurance contract or restricting coverage under an insurance policy or insurance contract.

(B) Adding a surcharge, applying a rating factor or using any other underwriting standard or practice which adversely takes into account a history or status of abuse.

(C) Excluding or limiting benefits or coverage under an insurance policy or insurance contract for losses incurred.

(ii) Nothing in this paragraph shall be construed as:

(A) requiring that a person issue, renew or reissue an insurance policy or insurance contract solely because the insured or applicant is a victim of abuse; or

(B) requiring a person to provide benefits or coverage for losses incurred solely because the insured or applicant is a victim of abuse.

(iii) A person shall not be in violation of this paragraph if any action taken is permissible by law and applies to the same extent to all applicants and insureds without regard to whether an applicant or insured is a victim of abuse.

(b) Nothing in subsection (a)(7) or (8) of this section shall be construed as including within the definition of discrimination or rebates any of the following practices:

(1) In the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums out of surplus accumulated from nonparticipating insurance if any such bonuses or abatement of premiums are fair and equitable to policyholders and for the best interests of the company and its policyholders;

(2) In the case of life insurance policies issued on the industrial or debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expense; or

(3) Readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

(c) Nothing in subsection (a)(9) of this section shall apply:

(1) If the insurer has manifested its willingness to renew by issuing or offering to issue a renewal policy, certificate or other evidence of renewal, including the mailing of a renewal premium notice to the insured not less than thirty days in advance of the expiration date of the policy.

(2) If the named insured has demonstrated by some overt action to the insurer or its agent other than mere nonpayment of premium that he wishes the policy to be cancelled or that he does not wish the policy to be renewed.

(3) To any policy of insurance which has been in effect less than sixty days, including any notice of termination

period, unless it is a renewal policy. Any declination of coverage within the sixty-day period provided in this clause shall, for purposes of review by the insurance commissioner, be deemed a refusal to write and shall not be subject to the provisions of subsection (a)(9) of this section.

(4) Any insured may within ten days of the receipt by the insured of notice of cancellation or notice of intention not to renew, request in writing to the insurance commissioner that he review the action of the insurer in cancelling or refusing to renew the policy of such insured.

§ 1171.6. Non-liability for statements or information provided

There shall be no liability on the part of and no cause of action of any nature shall arise against the insurance commissioner, any insurer, the authorized representatives, agents and employees of either, or of any firm, person or corporation furnishing to the insurer for any statement made by them in complying with this act or for providing information pertaining thereto.

§ 1171.7. Power of Commissioner

The Commissioner may examine and investigate the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by this act.

§ 1171.8. Administrative hearing

(a) If, as a result of investigation, the Commissioner has good cause to believe that any person is violating any provision of this act, the Commissioner shall send notice of the violation by certified mail to the person believed to be in violation. The notice shall state the time and place for hearing

which shall not be less than thirty days from the date of such notice.

(b) At the time and place fixed for the hearing in the notice, the person shall have an opportunity to be heard and to show cause why an order shall not be made by the commissioner to cease and desist from acts constituting a violation of this act and why administrative penalties should not be assessed.

(c) Upon good cause shown, the Commissioner shall permit any person to intervene, appear and be heard at the hearing, either in person or by counsel.

(d) The Commissioner may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence and subpoena witnesses, compel their attendance and require the production of books, papers, records or other documents which he deems relevant to the hearing. The Commissioner shall cause a record of all evidence and all proceedings at the hearing to be kept.

(e) Following the hearing, the Commissioner shall issue a written order resolving the factual issues presented at the hearing and stating what remedial action, if any, is required of the person charged. The Commissioner shall send a copy of the order to those persons participating in the hearing.

§ 1171.9. Administrative penalty

Upon a determination by hearing that this act has been violated, the Commissioner may issue an order requiring the person to cease and desist from engaging in such violation or, if such violation is a method of competition, act or practice defined in section 5 of this act, the Commissioner may suspend or revoke the person's license.

§ 1171.10. Injunction

If the alleged violator fails to comply with an order of the Commissioner following hearing to cease and desist from unfair methods of competition or an unfair or deceptive act or practice, the Commissioner may cause an action for injunction to be filed in the Commonwealth Court or the Court of Common Pleas of the county in which the violation occurred.

§ 1171.11. Civil penalties

In addition to any penalties imposed pursuant to this act, the court may, in an action filed by the Commissioner, impose the following civil penalties:

(1) For each method of competition, act or practice defined in section 5 of this act and in violation of this act which the person knew or reasonably should have known was such a violation, a penalty of not more than five thousand dollars ($5,000) for each but not to exceed and aggregate penalty of fifty thousand dollars ($50,000) in any six month period;

(2) For each method of competition, act or practice defined in section 5 of this act and in violation of this act which the person did not know nor reasonably should have known was such a violation, a penalty of not more than one thousand dollars ($1,000) for each violation but not to exceed an aggregate penalty of ten thousand dollars ($10,000) in any six month period; and

(3) For each violation of an order issued by the Commissioner pursuant to section 9 of this act, while such order is in effect, a penalty of not more than ten thousand dollars ($10,000).

§ 1171.12. Repealed

§ 1171.13. Provisions of act additional to existing law

The powers vested in the Commissioner by this act are additional to any other powers to enforce any penalties, fines or

forfeitures authorized by law with respect to the methods, acts and practices declared to be unfair and deceptive.

§ 1171.14. Exclusions

Health care plans administered by Joint Boards of Trustees pursuant to section 302 of The Labor Management Relations Act, 29 U.S.C. § 141, et seq., and employer administered health care plans pursuant to collective bargaining agreements which pay benefits from the assets of the trust or the funds of the employer as opposed to payments through an insurance company shall not be subject to any of the provisions of this act.

§ 1171.15. Repeals

(a) The act of June 5, 1947 (P.L. 445, No. 202), known as "The Insurance Unfair Practices Act," is repealed absolutely.

(b) All other acts and parts of acts are repealed in so far as they are inconsistent herewith.

PENNSYLVANIA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW, 40 Pa. S. § 201-1 to § 201-9.2

§ 201-1. Short title

This act shall be known and may be cited as the "Unfair Trade Practices and Consumer Protection Law."

§ 201-2. Definitions

As used in this act.

(1) "**Documentary material**" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other tangible document or recording, wherever situate.

(2) "**Person**" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities.

(3) "**Trade**" and "**commerce**" mean the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth.

(4) "**Unfair methods of competition**" and "**unfair or deceptive acts or practices**" mean any one or more of the following:

(i) Passing off goods or services as those of another;

(ii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;

(iii) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;

(iv) Using deceptive representations or designations of geographic origin in connection with goods or services;

(v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

(vi) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

(vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;

(viii) Disparaging the goods, services or business of another by false or misleading representation of fact;

(ix) Advertising goods or services with intent not to sell them as advertised;

(x) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(xi) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(xii) Promising or offering prior to time of sale to pay, credit or allow to any buyer, any compensation or reward for the procurement of a contract for purchase of goods or services with another or others, or for the referral of the name or names of another or others for the purpose of attempting to

procure or procuring such a contract of purchase with such other person or persons when such payment, credit, compensation or reward is contingent upon the occurrence of an event subsequent to the time of the signing of a contract to purchase;

(xiii) Promoting or engaging in any plan by which goods or services are sold to a person for a consideration and upon the further consideration that the purchaser secure or attempt to secure one or more persons likewise to join the said plan; each purchaser to be given the right to secure money, goods or services depending upon the number of persons joining the plan. In addition, promoting or engaging in any plan, commonly known as or similar to the so-called **"Chain-Letter Plan"** or **"Pyramid Club**." The terms **"Chain-Letter Plan"** or **"Pyramid Club"** mean any scheme for the disposal or distribution of property, services or anything of value whereby a participant pays valuable consideration, in whole or in part, for an opportunity to receive compensation for introducing or attempting to introduce one or more additional persons to participate in the scheme or for the opportunity to receive compensation when a person introduced by the participant introduces a new participant. As used in this subclause the term "consideration" means an investment of cash or the purchase of goods, other property, training or services, but does not include payments made for sales demonstration equipment and materials for use in making sales and not for resale furnished at no profit to any person in the program or to the company or corporation, nor does the term apply to a minimal initial payment of twenty-five dollars ($25) or less;

(xiv) Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made;

(xv) Knowingly misrepresenting that services, replacements or repairs are needed if they are not needed;

(xvi) Making repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing;

(xvii) Making solicitations for sales of goods or services over the telephone without first clearly, affirmatively and expressly stating:

(A) the identity of the seller;

(B) that the purpose of the call is to sell goods or services;

(C) the nature of the goods or services; and

(D) that no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion;

(xviii) Using a contract, form or any other document related to a consumer transaction which contains a confessed judgment clause that waives the consumer's right to assert a legal defense to an action;

(xix) Soliciting any order for the sale of goods to be ordered by the buyer through the mails or by telephone unless, at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer:

(A) within that time clearly and conspicuously stated in any such solicitation; or

(B) if no time is clearly and conspicuously stated, within thirty days after receipt of a properly completed order from the buyer, provided, however, where, at the time the merchandise is ordered, the buyer applies to the seller for credit to pay for the merchandise in whole or in part, the seller shall have fifty days, rather than thirty days, to perform the actions required by this subclause;

(xx) Failing to inform the purchaser of a new motor vehicle offered for sale at retail by a motor vehicle dealer of the following:

(A) that any rustproofing of the new motor vehicle offered by the motor vehicle dealer is optional;

(B) that the new motor vehicle has been rustproofed by the manufacturer and the nature and extent, if any, of the manufacturer's warranty which is applicable to that rustproofing;

The requirements of this subclause shall not be applicable and a motor vehicle dealer shall have no duty to inform if the motor vehicle dealer rustproofed a new motor vehicle before offering it for sale to that purchaser, provided that the dealer shall inform the purchaser whenever dealer rustproofing has an effect of any manufacturer's warranty applicable to the vehicle. This subclause shall not apply to any new motor vehicle which has been rustproofed by a motor vehicle dealer prior to the effective date of this subclause.

(xxi) Engaging in any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding.

§ 201-3. Unlawful acts or practices; exclusions

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce as defined by subclauses (i) through (xvii) of clause (4) of section 2 of this act and regulations promulgated under section 3.1 of

this act are hereby declared unlawful. The provisions of this act shall not apply to any owner, agent or employe [sic] of any radio or television station, or to any owner, publisher, printer, agent or employe [sic] of a newspaper or other publication, periodical or circular, who, in good faith and without knowledge of the falsity or deceptive character thereof, publishes, causes to be published or takes part in the publication of such advertisement.

§ 201-3.1. Regulations

The Attorney General may adopt, after public hearing, such rules and regulations as may be necessary for the enforcement and administration of this act. Such rules and regulations when promulgated pursuant to the act of July 31, 1968 (P.L. 769, No. 240), known as the "Commonwealth Documents Law," shall have the force and effect of law.

§ 201-4. Restraining prohibited acts

Whenever the Attorney General or a District Attorney has reason to believe that any person is using or is about to use any method, act or practice declared by section 3 of this act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the Commonwealth against such person to restrain by temporary or permanent injunction the use of such method, act or practice.

§ 201-4.1. Payment of costs and restitution

Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in section 4 above, the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any violation of this act, under terms and conditions to be established by the court.

§ 201-5. Assurances of voluntary compliance

In the administration of this act, the Attorney General may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be violative of the act from any person who has engaged or was about to engage in such method, act or practice. Such assurance may include a stipulation for voluntary payment by the alleged violator providing for the restitution by the alleged violator to consumers, of money, property or other things received from them in connection with a violation of this act. Any such assurance shall be in writing and be filed with the court. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose. Matters thus closed may at any time be reopened by the Attorney General for further proceedings in the public interest, pursuant to section 4.

§ 201-6. Deleted by amendment.

§ 201-7. Contracts; effect of rescission

(a) Where goods or services having a sale price of twenty-five dollars ($25) or more are sold or contracted to be sold to a buyer, as a result of, or in connection with, a contact with or call on the buyer or resident at his residence, either in person or by telephone, that consumer may avoid the contract or sale by notifying, in writing, the seller within three full business days following the day on which the contract or sale was made and by returning or holding available for return to the seller, in its original condition, any merchandise received under the contract or sale. Such notice of rescission shall be effective upon depositing the same in the United States mail or upon other service which gives the seller notice of rescission.

(b) At the time of the sale or contract the buyer shall be provided with:

(1) A fully completed receipt or copy of any contract pertaining to such sale, which is in the same language (Spanish, English, etc.) as that principally used in the oral sales

presentation, and also in English, and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of ten points, a statement in substantially the following form:

> "You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right."

(2) A completed form in duplicate, captioned "Notice of Cancellation," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten-point bold face type the following information and statements in the same language (Spanish, English, etc.) as that used in the contract:

Notice of Cancellation

(Enter Date of Transaction)

You may cancel this transaction, without any penalty or obligation, within three business days from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within ten business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled.

If you cancel, you must make available to the seller at your residence in substantially as good condition as when received, any goods delivered to you under this contract or sale;

or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within twenty days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram, to (name of seller), at (address of seller's place of business) not later than midnight of (date).

I hereby cancel this transaction.

_____

(Date)

_____

Buyer's Signature

(c) Before furnishing copies of the "Notice of Cancellation" to the buyer, both copies shall be completed by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

(d) Each buyer shall be informed at the time he signs the contract or purchases the goods or services, of his right to cancel.

(e) The cancellation period provided for in this section shall not begin to run until buyer has been informed or his right to cancel and has been provided with copies of the "Notice of Cancellation."

(f) Seller shall not misrepresent in any manner the buyer's right to cancel.

(g) Any valid notice of cancellation by a buyer shall be honored and within ten business days after the receipt of such notice, seller shall (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

(h) No note or other evidence of indebtedness shall be negotiated, transferred, sold or assigned by the seller to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

(i) Seller shall, within ten business days of receipt of the buyer's notice of cancellation, notify him whether the seller intends to repossess or to abandon any shipped or delivered goods. If seller elects to repossess, he must do so within twenty days of the date of buyer's notice of cancellation or forfeit all rights to the delivered goods.

(j) Rights afforded under this section may be waived only in circumstances where the goods or services are needed to meet a bona fide immediate personal emergency of the buyer and the buyer furnishes the seller with a separate dated and signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within three business days.

(k) As used in this section, merchandise shall not be construed to mean real property.

(*l*) The provisions of this section shall not apply to the sale or contract for the sale of goods or services having a sale price of less than twenty-five dollars ($25).

(m) A "Notice of Cancellation" which contains the form and content required by rule or regulation of the Federal Trade Commission shall be deemed to be in compliance with the requirements of this section.

§ 201-8. Civil penalties

(a) Any person who violates the terms of an injunction issued under section 4 of this act or any of the terms of an assurance of voluntary compliance duly filed in court under section 5 of this act shall forfeit and pay to the Commonwealth a civil penalty of not more than five thousand dollars ($5,000) for each violation. For the purposes of this section the court issuing an injunction or in which an assurance of voluntary compliance is filed shall retain jurisdiction, and the cause shall be continued; and, in such cases, the Attorney General, or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may petition for recovery of civil penalties and any other equitable relief deemed needed or proper.

(b) In any action brought under section 4 of this act, if the court finds that a person, firm or corporation is wilfully using or has wilfully used a method, act or practice declared unlawful by section 3 of this act, the Attorney General or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may recover, on behalf of the Commonwealth of Pennsylvania, a civil penalty of not exceeding one thousand dollars ($1,000) per violation, which civil penalty shall be in addition to other relief which may be granted under sections 4 and 4.1 of this act. Where the victim of the wilful use of a method, act or practice declared unlawful by section 3 of this act is sixty years of age or older, the civil

penalty shall not exceed three thousand dollars ($3,000) per violation, which penalty shall not be in addition to other relief which may be granted under sections 2 or 4.1 of this act.

§ 201-9. Forfeiture of franchise or right to do business; appointment of receiver

Upon petition by the Attorney General, the court having jurisdiction, may, in its discretion, order the dissolution, suspension or forfeiture of the franchise or right to do business of any person, firm or corporation which violates the terms of an injunction issued under section 4 of this act. In addition, the court may appoint a receiver of the assets of the company.

§ 201-9.1. Powers of receiver

When a receiver is appointed by the court pursuant to this act, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys, and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description of the person or persons for whom the receiver is appointed, received by means of any practice declared to be illegal and prohibited by this act, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use or employment of any unlawful practices and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained provable losses. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

§ 201-9.2. Private actions

(a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action, to recover actual damages or one hundred dollars ($100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper.

(b) Any permanent injunction, judgment or order of the court made under section 4 of this act shall be prima facie evidence in an action brought under section 9.2 of this act that the defendant used or employed acts or practices declared unlawful by section 3 of this act.